No. 35, Original

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF MAINE, ET AL., *Defendants*.

MOTION BY DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, RHODE ISLAND, SOUTH CAROLINA AND VIRGINIA FOR REFERENCE OF CASE TO A MASTER

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In this original action the United States has sued the thirteen Atlantic Seaboard States to adjudicate rights in the seabed and subsurface lands lying more than three miles from the coastline. Following this Court's order granting the United States leave to file its complaint, 395 U.S. 955, answers were filed by each of the defendant States. The United States has filed a motion for judgment and a supporting brief which requests that as the next step this case be briefed and argued to the Court. The eight defendant States that

join in this motion submit that the preferable course would be to refer the case to a master.[1]

In summary, the movant States propose that the case should be referred to a master to take evidence, make findings of fact, conclusions of law and recommendations for decree, and that the master be specially instructed to consider and report upon the scope and validity of the historical claims of the States to the submerged lands in question. This course is believed appropriate for two reasons: First, the historical claims constitute a central issue in this case and, contrary to the suggestion of the United States, remain open for determination; and, second, reference to a master is the most efficient means of resolving the historical claims together with any other issues in the case and such a reference is supported by the precedents in this Court.

I. THE HISTORICAL CLAIMS OF THE STATES ARE A CENTRAL ISSUE IN THE CASE AND ARE OPEN FOR RESOLUTION BY THIS COURT.

The ultimate issue posed by the complaint of the United States and the answers of the States essentially is whether the United States or the States have the proprietary right to develop the seabed and subsurface lands more than three miles from the coast of these States.[2] The necessary first step in resolving this issue is to determine the scope and validity of the historical claims of the States to the submerged lands

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[1] The States that have joined in this motion are Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia.

[2] Compare U.S. complaint, ¶¶ II-IV, with, *e.g.*, answer of Maine, ¶¶ II-IV. This issue involves a determination of how far the rights of each defendant State extend seaward beyond the three-mile line.

in question. This analysis is clear from the position taken by the United States, as well as that taken by the States, and it is borne out by the approach this Court has taken in prior litigation.

The critical nature of the historical claims is evident from the United States' own brief in support of its motion to file its complaint. There, in stating the "facts" it believes pertinent to the case, the brief (p. 12) asserts that "the thirteen original colonies did not separately acquire ownership of the three-mile belt in the adjacent sea or of the soil under it."[3] Similarly, in explaining that the facts set forth entitle the United States to relief, the brief's very first contention (p. 13) is that this Court has held that the original thirteen States did not acquire ownership of the belt. The United States appears to assume that if the States lacked historical ownership of the first three miles, their historical claims asserted here to proprietary rights in lands lying seaward of the belt necessarily fail. On this premise that the States' historical claims are infirm, the brief (pp. 12-14) implies that rights in submerged coastal lands beyond the belt were ultimately acquired by the United States and it asserts the claims were confirmed by Congress in the Submerged Lands Act, 43 U.S.C. § 1301, *et seq.* (1964).

The States in their answers to the complaint have directly controverted this premise that their historical claims are infirm. For example, Maine in its answer (p. 3) explicitly alleges that "as successor in title to certain grantees of the Crown of England" it is en-

[3] The thirteen original States are not identical with the States in this case; two of the original States—Connecticut and Pennsylvania—have no Atlantic coast and two of the States in this case—Maine and Florida—were not among the original thirteen.

titled to develop the submerged lands in question. The answers of certain other States are quite specific concerning these historical claims (*e.g.*, answer of Maryland, pp. 3-4), and each of the movant States intends to support its historical claims in substantial detail in the course of this litigation. Thus, at the outset of this case, the pleadings raise a pivotal issue on which the two sides are in dispute.

The centrality of the historical claims is confirmed by this Court's analysis in *United States* v. *California*, 332 U.S. 19 (1947), the only prior occasion on which historical claims of Atlantic Seaboard States to submerged lands off the coast were examined by the Court. In *California*, that State claimed *inter alia* that it had ownership of its three-mile coastal belt under "equal footing" principles because the thirteen original States owned their adjacent lands in the three-mile belt. The Court's first step in its analysis was to consider the historical claims of the thirteen States and it concluded that it could not say that the thirteen original States possessed historical ownership rights to the three-mile belt. 332 U.S. at 31. While for reasons stated below we believe that the *California* case does not in any way foreclose assertion of the historical claims advanced here, the decision's approach in making the existence of those claims the threshold question establishes their essential importance in cases of this kind.

The historical claims are even more important to a determination of the ultimate issue here than they were in *California* because of subsequent legislative developments. In that case, after concluding that the historical claims had not been established, the Court indicated that foreign policy, defense and like con-

siderations required federal sovereignty of submerged coastal lands and the Court implicitly rejected a separation from this sovereignty of proprietary rights to develop the lands themselves.[4] In 1953, Congress enacted the Submerged Lands Act in which it conveyed to the adjacent coastal States such proprietary interests as the United States possessed to develop submerged lands in the three-mile belt or in some cases within three leagues of the coast. At the same time, as to these granted lands the Act reserved in the United States a variety of rights including sovereign authority for purposes of commerce, navigation, national defense and international affairs. See, *e.g.*, Section 6(a), 43 U.S.C. § 1314(a) (1964); *United States* v. *Louisiana*, 363 U.S. 1, 10 (1960). Consequently, the separation of sovereign and proprietary interests has been found to be feasible, so that an assault by the United States upon the historical claims of the States to proprietary rights in the submerged lands here involved becomes even more critical to its own case.

The United States appears to take the position that the historical claims of the Atlantic Seaboard States have been foreclosed by this Court's determination in

[4] These considerations were not asserted as an independent ground for the Court's rejection of California's position. If such policy considerations had been sufficient to prevail over historical claims of the original thirteen States, they would also have prevailed over the historical claims of Texas in United States v. Texas, 339 U.S. 707 (1950), and resort to equal footing principles to debar Texas' historical claims would have been wholly unnecessary. Any suggestion that the historical ownership of submerged lands by the States once established could be defeated in favor of the United States because of merely prudential considerations and without due compensation to the States would raise major constitutional questions. See United States v. Carmack, 329 U.S. 230, 241-42 (1946).

the *California* case. See United States brief in support of motion for judgment, pp. 18, 24. The historical claims, however, remain open for three independent reasons. First, the *California* decision did not conclusively resolve any historical claims. Second, the claims it discussed are not identical to those pressed here. Third, whatever was decided, the States in this litigation were not parties to *California* and cannot be bound by any determination there.

In *California* the Court in discussing the historical claims of the thirteen original States chose its language carefully to indicate that it was not making a conclusive historical determination but rather that California had failed to prove its case. Thus, the Court stated that based upon "the wealth of material supplied . . . we cannot say" that the thirteen original colonies acquired ownership of the submerged lands, 332 U.S. at 31, and the Court noted that neither charters, treaties, "nor any other document to which we have been referred" established a pattern of colonial or State ownership over the submerged lands there in question. 332 U.S. at 32.[5]

Also, as repeated references show, the Court's attention was focused upon the alleged existence of a uniform three-mile territorial-boundary claim by the original States, upon which California's equal footing theory rested. 332 U.S. at 31-33. The *California* decision never discussed the varying historical claims

[5] The United States in its brief in support of motion for judgment (pp. 22-23) also refers to United States v. Louisiana, 339 U.S. 699 (1950), and United States v. Texas, 339 U.S. 707 (1950). However these two later decisions may be interpreted on other issues, neither of them purported to reexamine any historical materials concerning the claims of the thirteen original States to submerged coastal lands.

here asserted by the thirteen defendant States, which are based upon their individual historical circumstances. Moreover, these claims do not necessarily rest upon territorial boundaries, but also assert rights to control and regulate development of submerged lands, whether within or outside State boundaries, analogous to the rights recognized in the Continental Shelf Convention (15 U.S.T. (pt. 1) 471). Thus, not only does the *California* opinion itself caution that at most it determines only that California did not prove its point, but that point is itself not identical with the claims made here.

Finally, even if the decision had squarely rejected each of the States' historical claims now advanced, none of the thirteen defendant States was a party to that litigation and consequently is not bound by its determinations. It is, of course, settled law, with exceptions not here relevant, that a stranger to litigation is not concluded by its resolution of either factual or legal issues. See *Durfee* v. *Duke*, 375 U.S. 106, 115-16 (1963); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 690 (1961); *Restatement, Judgments* §§ 68, 70, 93-111 (1942). The rule that each person is entitled to his day in court upon an issue is of special pertinence where, as here, not only is the issue of extraordinary importance but proof bearing upon it is within the special competence of the party who was a stranger to the former litigation.[6]

[6] The United States observes that "some of the Atlantic Coast States participated, directly or indirectly, in the first *California* case as *amici curiae*" (brief in support of motion for judgment, p. 23). The report of the *California* decision lists the Attorney General of Massachusetts as participating in preparation of a brief *amicus curiae* filed on behalf of the National Association of Attorneys General; and the report shows that New York submitted its own brief *amicus curiae*. 332 U.S. at 21-22. Such roles do not

In sum, we see no basis for the statement of the United States that there is a "threshold question" whether this Court "is disposed to reconsider" conclusions previously reached (brief in support of motion for judgment, p. 18). The claims of the States rest upon specific historical propositions which the States assert and the United States disputes. Even if *California* and its successors were read as rejecting those historical propositions—a reading the movant States do not accept—it is the intention of these States to offer proof substantiating those propositions and showing that any past rejection of them was error. Since the movant States were not parties to the prior cases cited and thus cannot be foreclosed on res judicata grounds by the decisions therein, those propositions are necessarily put in issue by this litigation. On the basis of the evidence presented in this case, the Court may reject these propositions or may accept them in whole or in part; but the suggestion of the United States that the propositions may be *presumed* erroneous on the basis of evidence in some other case or cases cannot be justified.

II. THIS CASE AND ITS CENTRAL HISTORICAL ISSUES SHOULD APPROPRIATELY BE REFERRED TO A MASTER FOR INITIAL DETERMINATION.

The Court could itself determine the historical claims at issue in this case as well as other pertinent questions; the Court can, indeed, always perform itself

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under any discovered authority make the decision conclusive upon these two States, let alone bind the other eleven States in this case. In this connection it may be noted that Massachusetts sought leave to intervene in the *California* case and the United States, in successfully opposing that intervention, stated to the Court that "Massachusetts cannot be affected by any judgment which may be entered in the suit." Memorandum in opposition to motion of Massachusetts for leave to intervene, p. 1.

tasks assigned to a master and reference to a master is therefore necessarily a matter of judicial convenience and efficiency rather than absolute necessity. In this instance reference to a master is warranted for a variety of reasons including the great significance of the issues, the complexity of the data underlying their resolution, the liberal standard established by this Court for reference in original actions, numerous past precedents for such a reference, and the fact that no prejudicial delay will result from this suggested procedure.

It cannot reasonably be disputed that the present controversy is of vast importance. It involves a dispute between the United States and thirteen sovereign States. In terms of dollars the stakes may be inestimably large, see *United States* v. *Louisiana*, 363 U.S. 1, 11 & n.11 (1960), and matters of national policy are also involved, see *United States* v. *California*, 332 U.S. 19, 34-36 (1947). In this context, the most searching examination of the issues presented is required. As already shown, foremost among these underlying issues are the historical claims of the States.

The historical claims cannot be adequately resolved without examination of a vast array of historical materials. Among the pertinent documents are colonial charters, early colonial and State legislation, official correspondence during this period, and historical practice in the colonies and the newly formed States. Law and practice in England during pre- and post-revolutionary days are also critical because of the light they cast upon inherited English principles and because they bear upon the construction of colonial charters. In order to treat adequately the historical issues, it is

necessary to give attention to large numbers of documents of the kind just noted. In the *California* case, where an attempt was made to collect some of the materials bearing upon the thirteen States, a hundred or so colonial charters, early State laws and similar official materials were cited or quoted in part.[7] In *United States* v. *Texas,* 339 U.S. 707 (1950), the Court was presented with two cardboard boxes of documents limited to Texas' own brief history. 99 Cong. Rec. 2889 (1953) (Remarks of Sen. Daniel). In the present instance there are thirteen different States whose claims must be considered and a far greater period of time is involved. The movant States are currently making a thoroughgoing survey of State archives and other relevant sources in order to adduce the most complete record of material pertinent to their claims for presentation in this case. It is possible that in addition to documentary evidence the testimony of expert witnesses may be appropriate.

The importance of a particularized examination of historical evidence in resolving the present claims is supported by the pair of decisions, one from Canada and one from Australia, cited by the United States in its brief in support of motion for judgment (pp. 25-28). *Re Offshore Mineral Rights of British Columbia,* [1967] Canada L. Rep. (S. Ct.) 792, 65 D.L.R.2d

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[7] See appendix E to brief of California in opposition to motion for judgment. The attempt to excerpt documents necessarily led to omission of pertinent material. For example, one important Crown grant was set forth without including the provisions explicitly stating the broad construction to which it was entitled. Compare appendix E, p. 84, with Charter from Charles I to Lord Baltimore, June 20, 1632, art. XXII, reprinted in 3 Thorpe, American Charters, Constitutions and Organic Laws 1677, 1686 (1909).

353; *Bonser* v. *LaMacchia,* 43 Austl. L. J. Rep. 411 (High Court of Austl. 1969). Until the course of proceedings has been determined, there is no reason to consider in detail the support these decisions lend to the position of either side in this litigation, although the movant States dispute the assertion in the United States' brief (*id.* at 25) that the cases support any proposition so broad as that "the rights of the Crown stopped at the water's edge" at the time of or before the formation of the United States.[8] What is pertinent to the present question whether this case should be referred to a master is that both the Canadian and Australian courts found it necessary to engage in extensive examinations of history in order to resolve the exact claims before them. The historical documentation of the American colonial claims is far more extensive than anything considered in the Canadian and

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[8] The two decisions distinguished between various rights of the Crown and of individual colonies in Canada and Australia in connection with the sea. If in some respects or categories rights of the Crown halted at the low-water mark, it is incontestible that in other respects and categories they did not. Thus, for example, the opinion of Chief Justice Barwick of Australia stated in the same paragraph quoted in the United States' brief (p. 27): "However, accretion to the bed of the sea beneath territorial waters creating land above tidal limits has been held to be vested in the Crown. A basis for this conclusion is said to be the ownership by the Crown of the bed of the sea subjacent to such land: and expressions are used in the cases to which I later refer which treat the entire bed of the sea within three nautical miles as vested in the Crown." Moreover, the rights of the Crown were not necessarily the same in each period of history and, as is indicated in the opinion of Justice Windeyer, relied on by the United States (p. 28), these rights in some respects may have been greater before the 19th century English authority cited by the United States (p. 25). See 43 Austl. L. J. Rep. at 426-27.

Australian decisions.[9] In addition, the States propose to supplement this material by historical evidence bearing upon actual practice in the colonies.

After arguing that the historical claims of the States have been foreclosed but that they are in any event infirm on the merits, the United States in its brief in support of motion for judgment (pp. 29-30) invokes the pragmatic considerations concerning defense, foreign policy and other such matters mentioned in the *California* decision. Its contention appears to be that if the States' historical claims were valid they passed by implication to the United States on formation of the federal government. The assertion of what appears to be urged as an additional ground in support of the ultimate relief sought by the United States (compare n.4, *supra*) does not detract from the need for a master to resolve the historical issues relevant to the principal contention of the United States that the States lacked valid historical claims. On the contrary, the assertion of this additional ground argues in favor of the appointment of a master so that he may also consider evidence pertinent to this ground.

It seems reasonable to expect that there may be evidence, including oral testimony, available on the question whether the proprietary rights claimed by the movant States in submerged lands are incompatible with defense, foreign policy and other responsibilities of the national government. So far as such practical

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[9] The historical claims of the particular colonies in Canada and Australia are not, of course, identical to those advanced by the movant States here. Compare, *e.g.*, statutory grants to British Columbia, 65 D.L.R.2d at 357-58, with Grant of the Province of Maine of April 3, 1639, by Charles I, reprinted in 1 Poore, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 774 (1878).

considerations are relevant, the States may themselves submit evidence to establish that their own responsibilities—such as concern with environmental controls —support their ownership of the rights in question. If the United States does press practical considerations as an additional ground of decision, surely the most complete possible record should be developed on these issues. Also, American Constitutional Convention documents and other constitutional materials should be received and considered so far as they may bear upon any claim of an implied transfer of rights in submerged lands from the States to the national government. This multiplication of evidentiary material relevant to the litigation makes preliminary screening and appraisal by a master even more appropriate than if the existence of historical claims alone were in dispute.

Reference to a master in original actions in the Supreme Court is not, of course, limited to cases where a district court would appoint a master. Neither the facilities nor the limited time available in this Court lend themselves to the construction of an evidentiary record, and the use of a master to perform this function where the Court's original jurisdiction has been invoked is both sensible and established by precedent. In this instance a master could, through a limited number of hearings, receive the mass of historical material pertinent to State claims, select and organize the material, and provide a detailed analysis to this Court in his master's report. If oral testimony of scholars or other experts proves relevant to the historical claims, a master could easily receive it. Use of a master would not only lessen the burden upon the Court but would assure the most thorough and accurate evalu-

ation of conflicting claims as a foundation for this Court's eventual determination of the issues. In sum, the present case amply meets the standard previously set down by this Court in *United States* v. *Texas,* 339 U.S. 707, 715 (1950), for reference to a master:

> "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts. *United States* v. *Texas,* 162 U.S. 1; *Kansas* v. *Colorado,* 185 U.S. 125, 144, 145, 147; *Oklahoma* v. *Texas,* 253 U.S. 465, 471. If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential."

In a very large number of cases involving controversies between the United States and a State or among the several States, a master has been utilized as a matter of course. There are a score of instances of this kind among the limited number of original actions in these categories, see Comment, The Original Jurisdiction of the United States Supreme Court, 11 *Stan. L. Rev.* 665, 701-19 (1959). With few exceptions these cases parallel in type the present litigation. Thus such references have included actions to quiet title to riverbeds, *United States* v. *Utah,* 283 U.S. 64 (1931); actions to determine ownership of oil lands, *United States* v. *Wyoming,* 331 U.S. 440 (1947); boundary disputes between States, *New Jersey* v. *Delaware,* 291 U.S. 361 (1934); and suits to establish water rights between States, *Colorado* v. *Kansas,* 320 U.S. 383 (1943). There is thus ample precedent for the reference here requested.

Nothing in the Court's past practice in the several prior cases dealing with submerged coastal lands is inconsistent with a grant of this request. As this Court has itself noted, "In the *California* case, neither party suggested the necessity for the introduction of evidence." *United States* v. *Texas*, 339 U.S. 707, 715 (1950). It may well be that California's failure to seek a reference and present its evidence in detail influenced the outcome. Subsequently, in the first *Louisiana* and *Texas* cases, Louisiana did not seek a reference, *United States* v. *Louisiana*, 339 U.S. 699 (1950), and Texas' request for a reference was rejected because the Court found that equal footing principles debarred Texas' historical claims even if established by the evidence. *United States* v. *Texas*, 339 U.S. 707, 715 (1950). The Court's language in that instance strongly suggests that, absent the legal bar created by equal footing principles, a hearing would have been warranted on Texas' historical evidence. See p. 14, *supra*. Finally, in the litigation following the Submerged Lands Act the Court rejected the need for proceedings to develop evidence only because "the conclusions to be drawn from the historical documents relied on by Louisiana, Mississippi, and Alabama are so clear as to leave no issue presently involved open to dispute . . . ."[10]

Reference of the case to a master will not involve any delay prejudicial to the interests of either the

[10] United States v. Louisiana, 363 U.S. 1, 84-85 (1960). The historical standard established by the Submerged Lands Act was construed by the Court to require congressional acceptance of the States' disputed historical claims. Thus, an inquiry focused upon congressional history sufficed to disqualify Louisiana, Mississippi and Alabama from establishing their disputed claims under the Submerged Lands Act. See 363 U.S. at 30, 71.

United States or of the defendant States. A reference to a master could be made promptly and hearings could be fixed in order to allow this Court to receive the master's report at its next Term. To the extent proceedings before the Court were thereafter required, it is not impossible that they could also be concluded in that same Term. By contrast, even if the case were to be briefed and argued directly to this Court, it would not be practicable for it to be heard before the opening of the next Term.

Moreover, no harm would be worked by a brief delay should it occur in ultimate resolution of the case. None of the Atlantic Seaboard States is in the process of extracting minerals from the disputed seabed and, so far as is known, no such extraction is contemplated in the immediate future. Even if extraction did occur, the United States has sought an accounting in this very case. No demonstrated harm to the public interest has been incurred through failure to determine the precise rights of the United States and the States in the Atlantic seabed in the decade that has elapsed since the Submerged Lands Act. None will result from whatever brief delay may be necessary to provide a full consideration of the issues in this major litigation.

CONCLUSION

For the reasons stated, the movant States submit that the case be referred to a special master and that the master be directed in particular to consider and prepare detailed findings upon the historical claims of each of the thirteen defendant States. See, *e.g.*, *Texas* v. *New Mexico*, 344 U.S. 906 (1952). In making this request, the movant States reserve the right and

declare their intention to provide the historical material to the Court directly in the most efficient manner possible if the motion is denied and briefing and argument on the motion of the United States for judgment are ordered.

Should the Court follow the course suggested by the United States, the movant States concur in the time schedule for briefing and oral argument proposed by the United States in its brief in support of motion for judgment (pp. 19-20). That schedule contemplates that the brief in support of motion for judgment filed by the United States would constitute its opening brief on the merits, that the defendant States would file briefs and documents in response by June 1, 1970, that the United States would file any reply it wishes to make by September 1, 1970, and that oral argument would take place early in the next Term. In this connection, we urge that the proposed time schedule not be shortened by the Court to require the States to submit their briefs and supporting documents before June 1, 1970.

In the absence of a master's report, presentation of this original action directly to the Court entails preparing the evidentiary basis for State claims as well as the legal arguments. In view of the great importance of the issues and the substantial historical research required in the archives of the numerous States and in other sources, a time schedule shorter than that suggested would be burdensome to the movant States and prejudicial to their position. Since in the view of the movant States it would not be feasible to have oral argument in this case before the next Term, the suggested schedule would not result in any

additional delay in presentation of this case to the Court.

Respectfully submitted,

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